IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

ROBERT DUNLAP, *Appellant*,
v.
THE UNITED STATES.

No. 218.

Petition for Rehearing.

BENJA. F. TRACY,
GEORGE A. KING,
WILLIAM B. KING,
JOHN B. COTTON,
Attorneys for Appellant.

H. L. McQUEEN, PRINTER.

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PETITION FOR REHEARING.

Now comes the appellant, Robert Dunlap, and prays the court to set aside the judgment entered in this case on the 20th day of February, 1899, affirming the judgment of the Court of Claims, and to grant a rehearing. This petition is based on the following reasons:

Grounds of Decision.

The Court of Claims decided this case on the ground that the prescription of regulations by the Secretary of the Treasury was a condition to the grant of rebate. It expressly refrained from deciding whether the Secretary was directed to prescribe regulations. This court, sustaining the ground adopted by the court below, adds the further ground, that it was discretionary in the Secretary of the Treasury whether he should prescribe regulations. It is the purpose of this argument to analyze in detail the reasons assigned by this court for both these positions and to endeavor to show not only that they are untenable but also that important arguments bearing on appellant's case have been overlooked.

I. WAS THE ISSUANCE OF REGULATIONS DISCRETIONARY WITH THE SECRETARY?

The Right of Taxation Legislative, Not Executive.

In the appellant's opening brief (pp. 56–63) it is pointed out that the right to lay taxes, vested in Congress, can not be delegated to executive authority,—"a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution" (143 U. S. 692).

Section 61 of the revenue act of 1894 was a law relieving alcohol from taxation, under conditions named. Its object, the Court of Claims says, was that alcohol used in the arts should be "relieved of the burden of taxation." This court, in *Campbell* v. *United States* (107 U. S. 413) said:

"The drawback provision was simply a mode of making the linseed so imported and exported without distribution in the country duty free."

The Secretary of the Treasury (Sen. Ex. Doc. 34, 53d Congress, 3d session) spoke of this section as:

"The provision of the act of 1894 exempting from taxation alcohol used in the arts and for medicinal purposes."

Thus it was uniformly recognized that this rebate law was intended to relieve from taxation, as much as if it had provided that the tax should not be originally paid. It is therefore governed by the same principles as would control such a law.

The opinion of the court in *Field* v. *Clark*, 143 U. S. 692, sustained the constitutionality of the reciprocity

provision of the revenue act of 1890 on the sole ground that

"nothing involving the expediency or just operation of such legislation was left to the determination of the President. * * It does not, in any real sense, invest the President with the power of legislation."

The distinguished author of the concurring opinion in that case used the following language (p. 700) in regard to this provision:

"It unquestionably vests in the President the power to regulate our commerce with all foreign nations which produce sugar, tea, coffee, molasses, hides or any of such articles; and to impose revenue duties upon them for a length of time limited solely by his discretion, whenever he deems the revenue system or policy of any nation in which those articles are produced, reciprocally unequal and unreasonable, in its operation upon the products of this country.

"These features of this section are, in our opinion, in palpable violation of the Constitution of the United States, and serve to distinguish it from the legislative precedents which are relied upon to sustain it, as the practice of the government. None of these legislative precedents, save the one above referred to, have, as yet, undergone review by this court or been sustained by its decision. And if there be any Congressional legislation which may be construed as delegating to the President the power to suspend any law exempting any importations from duty, or to reimpose revenue duties on them, upon his own judgment as to what constitutes in the revenue policy of other countries a fair and reasonable reciprocity, such legislative precedents can not avail as authority against a clear and undoubted principle of the Constitution."

This seems difficult to reconcile with the views announced in the opinion in this case:

"Congress may reasonably be held to have left it to the Secretary to determine whether or not such regula-

tions could be framed, and if so, whether further legislation would be required. It is true that the right to the rebate was derived from the statute, but it was the statute itself which postponed the existence of the right until the Secretary had prescribed regulations if he found it practicable to do so."

"We think the argument entitled to great weight, and that it demonstrates the intention of Congress to leave the entire matter to the Treasury Department to ascertain what would be needed in order to carry the section into effect."

No consideration whatever is given in the opinion to the important point now urged that to hold it discretionary in the Secretary to enforce a tax law is to declare that Congress vested in him legislative powers, contrary to the limitations of the Constitution.

The mandatory words of the act, "regulations to be prescribed," are not referred to at all in the opinion, although it insists on a literal construction in the words:

"Nor are we able to see that the letter of the statute did not fully disclose the intent."

On the contrary, the court thus states its position in this regard:

"It was the statute itself which postponed the existence of the right until the Secretary had prescribed regulations *if he found it practicable to do so.*"

It is thus necessary to this position to introduce into the act a condition nowhere in it expressed and inconsistent with the words used. This is submitted as the most convincing argument to show the error of this position of the court.

Assertions in Debate.

The opinion upholds this position by arguments which should be subjected to further discussion before receiving the final sanction of this court. An assertion on the floor of the Senate by a Senator not the author of § 61 to the effect that discretion was given in this section to the Secretary of the Treasury is inserted in the opinion of the court with the remark that it is "interesting to note." It is hard to find a valid reason for noting it there, unless it is to be considered of value in determining the intent of the act. This purpose is disclaimed in the opening clause of the paragraph in which the quotation appears, and reference is made to a very recent case which in no uncertain terms declares such an argument inadmissible (*United States* v. *Freight Association*, 166 U. S. 316):

"The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed."

It is therefore clear that it is not intended that this quotation should have any weight whatever in supporting the reasoning of the opinion. Were no other grounds advanced for the conclusion, this would necessarily be declared erroneous. Yet it would be very unfortunate if a doctrine so clearly declared in the case cited should be subjected to doubt by the use in this case of a quotation which future astute advocates will declare could have no other office in a judicial opinion than as an exposition of the intent of Congress.

The Subsequent Action of the Secretary and of Congress.

An argument in support of the position that the Secretary was given discretion whether to enforce this law is also apparently drawn from the following facts:

The Secretary declined to execute it, asserting a want of sufficient funds; he so notified the Congress which passed it, at its next session, and at the following session the next Congress repealed the law. The counsel for both parties have been unable to find any precedents bearing upon either side of this argument. It may fairly be said that the reason for this is that it is now for the first time intimated that such facts constitute a rule of statutory interpretation.

The position of the court gains no strength from the action of the Secretary, as he neither expressed his inability to make regulations nor asserted any discretion in himself. His position was that he had no funds, such as would be required to execute efficient regulations. The analysis of the question of appropriation made in the appellant's brief showed so conclusively that the Secretary was wrong in the reason asserted by him that neither this court nor the court below justified his action on that ground. He refused to execute the law for one reason—that he had no funds. The Court of Claims disclaimed inquiry into his reasons or duty. This court sustains his action for another reason, never asserted by him,—that it was within his discretion to execute the law, if he approved it as practicable.

Was the inaction of Congress upon his report at its next session a construction of the original act? How can it be said that the failure of Congress to make a further appropriation to administer this law was due to approval of the Secretary's failure to carry it out, rather than to a belief that he had sufficient funds already

available for the purpose, or simply to the fact that he made no proper estimate for the appropriation which he thought necessary? Where is the inaction of Congress declared to be an expression of a positive purpose? The purpose of Congress is expressed by its resolves, and here none was made. The House of Representatives passed a bill repealing § 61, but the Senate failed to concur (26 Cong. Rec. 8594, 8604, 8614). What this does show is that it was not the desire of this Congress that the law should be repealed.

It can not be seen what effect the repeal of the law by the next Congress had upon rights granted under the original law or how it could be considered a construction of it. The membership of Congress was different. It is a matter of public history that its House of Representatives would have framed a revenue measure upon entirely different lines from the act of August 28, 1894. Therefore the repeal of the law is no more a factor bearing upon its construction than is the substitution by the next succeeding Congress in 1897 of a new revenue act in place of that of 1894 to be considered in construing the terms of the act of 1894.

Thus it must be concluded that, however interesting as matters of history may be, the report of the Secretary of the Treasury, or the failure of one Congress to make appropriation or the repeal of § 61 by the next Congress, neither one alone nor all together establish the position for which they seem to be cited, that Congress in passing the original act desired to vest discretion in the Secretary of the Treasury, whether alcohol used in the arts should be free of tax.

The doctrine announced by the court seems inconsistent with a recognized constitutional principle and it is thought the reasons given in the opinion can not be sustained on analysis. Hence the decision already made should be set aside and a rehearing ordered.

II. ARE REGULATIONS A CONDITION TO REBATE?

The Expectation of Congress.

It is assumed in the opinion that this law can be executed in no other way than under executive regulations because other laws taxing alcohol are administered under executive regulation and supervision. The opinion says:

"It seems clear that when Congress undertook to provide for refunding the tax on alcohol when used in the arts, it manifestly regarded adequate regulations to prevent loss through fraudulent claims as absolutely an essential prerequisite."

"Nothing could have been further from the mind of Congress than that repayment must be made on the unregulated use of alcohol in the arts, if in the judgment of the department, as the matter stood, such use could not be regulated."

It is a sufficient answer to this that the making of regulations was required of the Secretary of the Treasury and that Congress in passing § 61 expected that he would obey it. The expectation of Congress was that regulations would be made and, to apply the words of the opinion, "nothing could have been further from the mind of Congress than" that the Department would refuse to issue regulations. We are now confronting a condition not expected by Congress to arise. The fact urged by the government that the manufacture of alcohol and its sale are hedged about by most elaborate restrictions, when coupled with the requirement of this act that regulations should be made by the Secretary of the Treasury, is clearly convincing of the position that Congress expected that regulations would be made, but it does not help at all in answering the inquiry: What are the rights of citizens interested, when the executive refused to perform the duties prescribed by the law? The

answer to this inquiry is found in the general principle that a party may not profit by the failure of performance of his own obligation and, if objected that this principle is inapplicable to the government, then more directly still by the principle that the right to tax or to make free of tax is exclusively legislative and that the executive may not be given discretion in this particular.

It seems an inappropriate doctrine to be propounded by the judiciary that the government is in danger of being defrauded by permitting the establishment of a right under this statute, in the absence of executive regulations, by proof of all the conditions of that right by judicial evidence and trial. The courts to which is committed the determination of questions between citizens and the government arising from the failure of government officers to do acts required of them by statutes or lawful contracts are accustomed to require a degree of proof sufficient to protect the interest of the government. That these rules would be relaxed in this class of cases is not to be supposed. In other words, the Secretary of the Treasury having failed to prescribe regulations, the judiciary is to substitute for those regulations convincing evidence produced under judicial safeguards, of the facts constituting the claimant's right.

The executive having failed to do what was expected of it by Congress, that is, to prescribe regulations, we now submit the question whether it was more within the expectation of Congress that the freedom from tax intended by the statute should fail or that, when denied by the executive, it should be protected by the judiciary. It is not within the expectation of Congress that any citizen to whom a right is granted should be deprived that right by the executive department charged with enforcing it, yet that frequently happens and the right of redress by the judiciary is not denied.

The Authorities Contrasted.

United States v. *McLean* and *Campbell* v. *United States.*

The only authority cited by the court in support of the position that regulations are a prerequisite to rebate is *United States* v. *McLean* (95 U. S. 750). It is held that this presents a closer analogy to the present case than *Campbell* v. *United States* (107 U. S. 407). In the former case executive action was held essential to the completion of a right granted and in the other executive action was only an incident in the ascertainment of the right. To show the difference between the present case and that of *Campbell* v. *United States*, the two controlling statutes are given in parallel columns. Bringing into the comparison the statutes controlling *United States* v. *McLean*, a far greater divergence appears:

Act of July 1, 1864, § 2, 13 Stat. L. 336.

"That the Postmaster-General shall review once in two years, and in special cases, upon satisfactory representation, as much oftener as he may deem expedient, and readjust, on the basis of the preceding section, the salary assigned by him to any office;"

Act of June 12, 1866, § 8, 14 Stat. L. 60, amends this by adding:

"*Provided*, That when the quarterly returns of any postmaster of the third, fourth or fifth class show that the salary allowed is ten per centum less than it would be on the basis of commissions under the act of 1854, fixing compensation, then the Postmaster-General shall review and readjust under the provisions of said section."

Act of August 28, 1894, § 61, 28 Stat. L. 567.

"Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the Treasury of the United States a rebate or repayment of the tax so paid."

Act of August 5, 1861, § 4, 12 Stat. L. 292.

"From and after the passage of this act, there shall be allowed, on all articles wholly manufactured of materials imported, on which duties have been paid, when exported, a drawback, equal in amount to the duty paid on such materials and no more, to be ascertained under such regulations as shall be prescribed by the Secretary of the Treasury; *Provided*, that ten per centum on the amount of all drawbacks, so allowed, shall be retained for the use of the United States by the collectors paying such drawbacks respectively."

It can not be denied that the phraseology of the statute—and this argument of the court rests on phraseology alone—would place the act of 1894 in the class with that of 1861, rather than those of 1864 and 1866.

While the opinion points out the distinction between the acts of 1861 and 1894, the whole course of reasoning is overlooked by which the conclusion in the *Campbell* case was reached. This was not by a verbal criticism of the statute but by consideration of its purpose and object.

"He [the collector of customs] exercises no judicial or *quasi*-judicial function. He concludes nobody's rights and has no power to do so. The rights which the law gives can not be defeated by his refusal to act, nor by his decision that no drawback was due.

"Neither the act of Congress, nor any rule of construction known to us, makes the claimant's right, when the facts on which it depends are clearly established, to turn upon the view which the collector or the Secretary, or both combined, may entertain of the law upon that subject, and much less upon their arbitrary refusal to perform the services which the law imposes on them." (107 U. S. 413.)

The primary object of the statute was to make free of duty what had been taxed by another law. The object was to be accomplished, with due regard to the protection of the revenue, by the ascertainment of the facts and the repayment of the tax under executive regulation. This court did not permit the object of the law to fail because the sole mode of executing it declared in the statute was not accomplished. It substituted a judicial, for the statutory executive, method.

There is no difference here. However carefully may be pointed out the discriminations in phraseology between the acts of 1861 and 1894, it has never been shown that any different object is to be attained under the one act than under the other—the ascertainment, under due

safeguards, of the amount of tax to be rebated to each person entitled to it. The conditions are all given in the act,—the use by a manufacturer, the use in the arts or medicines, and the necessity for the use. When these are met, the intention was to give the rebate. The rest is the ascertainment of the right.

When tried by a practical standard, there is no difference between the mode of ascertaining the amount of drawback under the act of 1861 and of rebate under the act of 1894. Under the earlier law and its subsequent re-enactments and amendments, the Treasury Department has always insisted upon a right to supervise the process of manufacture.

Thus in Treasury circular 84 of June 8, 1897 (Synopsis 18,097), amending Article 758 of the Customs Regulations of 1892, that the proprietor of the factory at which goods covered by drawback entry are manufactured, shall declare

"that a separate true account of all imported materials, and of all articles manufactured therefrom for export, is kept at such place or factory and that such account is at all times open to the inspection of officers of the customs."

It was thus also specially provided, on December 7, 1898, in making regulations for the repayment of "Drawback on pig iron, steel billets, steel rails, or steel fish plates" (Treasury Decisions, Vol. 2, p. 987, Synopsis 20,400) under section 30 of the act of July 24, 1897 (30 Stat. L. 211), the latest re-enactment of the section considered in the *Campbell* case,

"On receipt of the aforesaid statement, the collector will detail a customs officer to supervise and inspect the process of manufacture for export with benefit of drawback, and the manufacturers shall be required to reimburse the government for the compensation paid to such officer during the time he is so employed, and such officer

shall at all times be given free access to the works of said company, and to the records pertaining to the manufacture of the articles to be exported."

Here is a regulated manufacture as complete as has been contended for under § 61 of the act of 1894.

Morrill v. *Jones.*

Notwithstanding this verbal comparison between the acts of 1861 and 1894, and the discrimination declared to exist between the object of regulations under the two acts, we find no reference to the practically identical statute construed in *Morrill* v. *Jones* (106 U. S. 466). Here again parallel columns are used to indicate the relation:

Revised Statutes, § 2505.

"Animals, alive, specially imported for breeding purposes from beyond the seas, shall be admitted free, upon proof thereof satisfactory to the Secretary of the Treasury, and under such regulations as he may prescribe."

Act of August 28, 1894, § 61, 28 Stat. L. 567.

"Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the Treasury of the United States a rebate or repayment of the tax so paid."

Under this law there was to be no ascertainment of any amount by the Secretary of the Treasury, but there was to be a regulated importation, doubtless involving personal inspection. Animals were admitted without this regulated importation, and yet the claimant's right to freedom from tax was granted by this court.

We submit that the fundamental error in allying this

case with that of *McLean* rather than with those of *Campbell* and *Jones* is in overlooking the constitutional principle already here alluded to, that the right to lay or remove taxes rests in Congress alone.

Prior Revenue Decisions.

It is a striking fact that until the decision of this case, in all of the many cases before this and other Federal courts, involving the effect of executive regulations upon the rights of citizens under revenue laws the object of the statute in taxing or not taxing had been enforced in spite of executive action or inaction. Of such cases we name the following, some, but not all, of which were treated in the appellant's briefs:

Dollar Savings Bank v. *United States*, 19 Wall. 227;
United States v. *200 Barrels of Whiskey*, 95 U. S. 571, 576;
Merritt v. *Welsh*, 104 U. S. 694;
Morrill v. *Jones*, 106 U. S. 466;
Campbell v. *United States*, 107 U. S. 407;
Wright v. *Roseberry*, 121 U. S. 488, 509;
United States v. *Ballin*, 144 U. S. 1;
United States v. *Eaton*, 144 U. S. 677, 687;
United States v. *American Tobacco Co.* 166 U. S. 468;
Balfour v. *Sullivan*, 19 Fed. Rep. 578;
Pascal v. *Sullivan*, 21 Fed. Rep. 496;
Siegfried v. *Phelps*, 40 Fed. Rep. 660;
Dominici v. *United States*, 72 Fed. Rep. 46;
United States v. *Mercadante*, 72 Fed. Rep. 46;
Bartram v. *United States*, 77 Fed. Rep. 604;
United States v. *Dominici*, 78 Fed. Rep. 334.

The following under the public land and other laws are added:

Railroad Co. v. *Smith*, 9 Wall. 95;

French v. *Fyan*, 93 U. S. 169;
United States v. *Mann*, 2 Brock. 1;
United States v. *Bedgood*, 49 Fed. Rep. 54;
Anchor v. *Howe*, 50 Fed. Rep. 367.

The only case in opposition to this position cited by the Attorney-General or considered by the court, is *United States* v. *McLean*, 95 U. S. 750. This case involved the salary of a postmaster, where a readjustment upon evidence presented to the head of the Department was made necessary by the express terms of the law;—not the case of a regulation to carry out an object already expressed in statute. The decision was reached with regret, if not hesitation; it was based on the peculiarities of the statute in the case and on no prior cases; its authority is seriously shaken by the later decision on the same subject of litigation (*McLean* v. *Vilas*, 124 U. S. 86), and it has never been cited by this court as a precedent except in cases relating to the very subject involved.

CONCLUSION.

The present case involves questions of far-reaching importance touching the relations of the executive with the legislative power. The very close division of the court attests their difficulty more strongly than could any argument of counsel. These reasons make it peculiarly desirable that a conclusion of a more decisive character than that reached by a nearly equally divided court should be attained. It is thought that this may be reached by a reargument and reconsideration of the case.

BENJA. F. TRACY,
GEORGE A. KING,
WILLIAM B. KING,
JOHN B. COTTON,
Counsel for Appellant.